

## **REMARKS**

Claims 3-8, 10-11 and 14 are currently pending. Claims 1, 2, 9 12, 13, and 15 are cancelled. Claims 3-8, 10-11 and 14 are amended. Support for these amendments can be found in the Specification paragraphs [0012], [0020]; [0185]; [0231]-[0238]; [0284]-[0294]; and [0359]-[0374]. No new matter has been added.

### **I. Double Patenting**

Applicants note that the claims have been rejected for obviousness-type double patenting in view of claims 1-15 of 10/742360. No patent has issued yet from U.S. Patent Application No. 10/742360, thus a rejection on the basis of double patenting is premature and Applicants treat it as a *provisional* rejection on the stated basis. Provisional double patenting rejections of this type do not require Applicants' to act at this time. The Court of Claims and Patent Appeals (now the Court of Appeals for the Federal Circuit) has stated, "Once the provisional rejection has been made, there is nothing the examiner and the applicant must do until the other application issues." *In re Mott*, 190 U.S.P.Q. 536, 541 (C.C.P.A. 1976). In fact, the amendments made herein above render the current double patenting rejection moot. M.P.E.P. section 804 allows for the prosecution to continue while a provisional double-patenting rejection is pending and even instructs the Office to continue to make such a provisional rejection until one of the applications issues as a patent. Thus, the rejection is noted, and Applicants' will address the rejection appropriately once one of the asserted conflicting claim sets has been deemed allowable.

### **II. Rejections under 35 U.S.C. § 102(b)**

The claims stand rejected under 35 U.S.C. §102(b) as anticipated by each of Foreman *et al.* (U.S. Pub. NO. 2001/0048955; "Foreman"); Bruce *et al.* (WO 01/97605; "Bruce I"); and Bruce *et al.* (WO 01/97630; "Bruce II"). As each reference is independently asserted as anticipating the claims, Applicants address each in turn

### A. The Claims are not anticipated by Foreman

Foreman does not teach each and every element of the current claims, thus Foreman does not anticipate. M.P.E.P. §2131; *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). The current claims are directed to a method of animal weight maintenance. The method comprises feeding the animal unlimited quantities of a multi- component foodstuff, and allowing said animal to freely self-select from the compartmentalised food compositions. The foodstuff comprises two or more compartmentalised food compositions, wherein at least two of the compositions differ from each other by at least 1% on an energy ratio basis in their content of two or more of fat, protein and carbohydrate. The self-selection is driven by protein energy ratio.

In contrast, Foreman is directed to a single pet meal consisting of a main dish, side dish, and a treat, all provided in a single tray, the tray having multiple compartments. Foreman, Abstract. Forman is directed to packaging issues, and to a large extent, the perceptions of pet owners who wish to treat their pet like “one of the family.” *Id.* ¶¶[0013]; 0017]-[0020]. In fact, one section of Foreman that the Action relies upon (¶[0034]) is dedicated entirely to describing the use of food meant for human consumption (Louis Rich© turkey, a slice of Wonderbread© white bread, and Hearthstone© gravy) as a main course for a dog meal. In contrast, the ready-to-eat cereal products referred to in Applicants’ Specification are commonly known as “kibbles,” and are not white-bread equivalent. See Specification ¶[0011] (last 5 lines).

Of particular importance is that Foreman entirely fails to teach a method of animal weight maintenance, self-selection, and what drives the self-selection. In fact, the expectation in Foreman is that the main course and treat are placed on the tray, the tray is, “presented to the animal and the *animal consumes the contents* of the compartments,” regardless of whether the animal would self-select or not. Foreman, ¶[0009] (emphasis added). Foreman states in passing the pet meal provided in a compartmented tray could be used for a cat, but only having two compartments and including a treat such as cat nip. *Id.*, ¶¶[0050]-0051]. As Foreman correctly states, cat nip is an herb. *Id.* As such, it contains virtually no protein (or other) nutrition at all. Alternative “treats” suggested by Foreman are

based solely upon flavor and smell. Foreman, ¶[0051]. This is completely contrary to the present invention, wherein the animal self-selects on the basis of protein and nutrition, not hedonic cues such as flavor. See, for example, Specification Examples 1-2 ¶[0090]-[0238]. In sum, Foreman does not teach the method claimed above and does not render the claims anticipated. 35 U.S.C. §102.

**B. The Claims are not anticipated by Bruce I**

Similarly, Bruce I does not teach each and every element of the current claims, thus Bruce I does not anticipate. M.P.E.P. §2131; *Verdegaal Bros.*, 814 F.2d at 631, 2 USPQ2d at 1053. Bruce I does not teach a method of animal weight maintenance; on this basis alone, Bruce I cannot anticipate the claims. Bruce I also describes a feline food pack comprising two or more vessels holding different food products having different compositions that are *intended to be fed at different times of the day*. Bruce I, p.2 ll.4-12. Specifically, “the animal is fed one meal in the morning and one meal in the afternoon/evening...” *Id.* ll.24-25. Thus, self selection is not taught by Bruce I, self selection on the basis of protein energy ratio is not taught, and self selection would not be possible by using what Bruce I describes. Bruce I also teaches the food pack provides pet food for a specific unit of time, for example, one day. Bruce I, p.6 ll. 3-9. Thus, Bruce I does not teach providing unlimited quantities. Like self-selection, according to what Bruce I teaches, unlimited quantities is not possible. Bruce I does not anticipate the current claims. 35 U.S.C. §102.

**C. The Claims are not anticipated by Bruce II**

Finally, Bruce II does not teach each and every element of the current claims, thus Bruce II does not anticipate. M.P.E.P. §2131; *Verdegaal Bros.*, 814 F.2d at 631, 2 USPQ2d at 1053. Bruce II teaches a dietary regime wherein different food products are fed to animal in correlation with specific events, and in particular, at different times of the day. Bruce II, p.1 line 27-p.2 line 10. But like Bruce I, Bruce II does not teach providing unlimited quantities of the food, self selection, self selection driven by protein energy ratio, and/or a method of animal weight maintenance. Like Bruce I, Bruce II prevents free self-selection. Bruce II, like Bruce I, fails to anticipate Applicants’ current claims under 35 U.S.C. section 102.

### **III. Unexpected Results preempt any forthcoming rejections under section 103**

No rejection for obviousness under 35 U.S.C. section 103 has been made in this case. However, Applicants submit that no new rejection of the current claims under section 103 could be proper in view of Applicants' unexpected findings. In particular, it is surprising that animals, and particularly cats, provided unlimited amounts of foodstuff in accordance with the present invention (and extensively described in the Detailed Description) maintain their weight. The method described involves compositions that differ in their macronutrient profile which allows the animal to achieve, by its own selection, its optimum ratio. Once that ratio is achieved, the animal will stop feeding. This method thus yields unexpected, and improved qualities. M.P.E.P. §2145; *In re Dillon*, 919 F.2d 688, 692, 16 USPQ2d 1897, 1901 (Fed. Cir. 1990).

### **IV. Conclusion**

Applicants believe the above addresses all outstanding issues and the Application is now in condition for allowance. Early notification to that effect is thus earnestly solicited.

Dated: March 11, 2009

Respectfully submitted,

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